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No. 09-322

Supreme Court, U.S.
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In The
Supreme Court of the United States

CRYSTAL GREGORY; ALBERTA TURNER; CARLA TURNER; TREVA GAGE; DEBRA HAMILTON; CAPRIA LEE; JEFF McKINNEY; ARNEL MONROE; MICHAEL RICHMOND; MAREN SNELL; FELICIA TURNER; MICHAEL WARRICK; and LASHANDA WISHAM,

Petitioners,

v.

DILLARD'S, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in affirming the dismissal under Rule 12(b)(6) of the claims of petitioners Gage, Hamilton, Lee, Monroe, Richmond, Snell, Felicia Turner, Warrick, and Wisham for failure adequately to plead a claim for relief under 42 U.S.C. §1981.

2. Whether as to petitioners Gregory, Alberta and Carla Turner, and McKinney, the Court of Appeals correctly held that §1981 does not provide a cause of action for allegedly discriminatory surveillance where, as here, petitioners were watched while they shopped but were not confronted, detained, searched, accused, arrested, or asked to leave respondent's store, and were never denied the right to buy any merchandise they desired to buy.

CORPORATE DISCLOSURE STATEMENT

Respondent Dillard's, Inc., is a publicly-held corporation listed on the New York Stock Exchange. It has no parent corporation, and no publicly-held corporation owns ten percent or more of its stock.

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REASONS FOR DENYING THE PETITION

Petitioners' request for review by this Court is largely an abstract polemic on some of the perceived evils in society that is divorced from the actual facts of this case. And their description of various cases ignores or blurs the factual differences in those cases in an effort to demonstrate an alleged "confusion among circuits." Petitioners seem oblivious to the fact that, as to nine of them, the Court of Appeals held that they had not adequately *pleaded* a §1981 case. They make no attempt to challenge the Eighth Circuit's application of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007), or its resulting holding that those nine petitioners did not properly *plead* the requisite elements of a §1981 claim (Pet. Apdx 16-19). As to those petitioners, therefore, the Petition does not even purport to seek review of the basis for the lower court's judgment against them. As to the remaining four petitioners, the Petition misstates the conduct of respondent's employees, which was nothing more than silent surveillance and which never "interfered" with or "thwarted" any attempt by any petitioner to buy any merchandise of his or her choosing.

We will discuss the two sets of petitioners separately.

I. The Court of Appeals Correctly Applied *Twombly* in Holding That Nine of the Petitioners Had Not Adequately Stated a Claim Under §1981, and the Petition Does Not Address That Ruling.

The claims of petitioners Gage, Hamilton, Lee, Monroe, Richmond, Snell, Felicia Turner, Warrick, and Wisham (the "Rule 12 petitioners") were dismissed by the district court under Rule 12(b)(6) for failure to state a claim upon which relief could be granted (Pet. Apdx 142-45). The Petition does not mention Rule 8, Rule 12, or *Twombly*, and does not attempt to establish the sufficiency of the allegations of the complaint by the Rule 12 petitioners. The "Question Presented" is simply *not* presented as to them.

In their Third Amended Complaint, the Rule 12 petitioners alleged collectively that "each experienced . . . instances at Dillard's Columbia store in which they were followed and/or otherwise subjected to surveillance based upon their race." (8th Cir. Apdx 58). Each of the petitioners then set forth his or her claim in a separately-numbered count. Counts I-III involved petitioners Crystal Gregory, Alberta Turner, and Carla Turner (as to whom summary judgment was eventually granted and affirmed). Count IV purported to assert claims by those three petitioners on behalf of a class.[1] Counts VI (Gage), VIII (Hamilton),

[1] Class certification was denied by the district court, and that determination was not appealed.

IX (Lee), XII (Monroe), XIII (Richmond), XIV (Snell), XV (Felicia Turner), XVI (Warrick) and XVII (Wisham) each contained the following identical, conclusory boilerplate language without any factual detail.[2]

> "Plaintiff sought to make and enforce a contract for services ordinarily provided by Dillard's, Inc.
>
> "Plaintiff was denied the right to enter into or enjoy the benefits or privileges of the contractual relationship in that:
>
> "a. Plaintiff was deprived of services while similarly situated persons outside the protected class were not; and/or
>
> "b. Plaintiff received services in a markedly hostile manner and in a manner which a reasonable person would find objectively discriminatory." (*Id.* at 61, 65, 67, 73, 75, 77, 79, 81, 83).

The remaining verbatim allegations of each count summarily asserted that Dillard's engaged in unlawful discriminatory practices, conducts intentionally racially discriminatory surveillance, and has exhibited a pattern and practice of discrimination

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[2] The omitted intervening counts related to original plaintiffs who are no longer parties and to Jeff McKinney (Count XI), whose claim was dismissed on summary judgment.

against African-American citizens. No details of any supposedly discriminatory acts *vis-à-vis* any particular petitioner were set forth in any of these counts.[3]

After the district court's dismissal order, this Court tightened the pleading requirements under Fed. R. Civ. P. 8 to reinforce the prohibition of the conclusory type of pleading that is featured in this case. In *Twombly*, 127 S. Ct. at 1964-65, the Court said:

> "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do, see *Papasan v. Allain*, 478 U.S. 265, 286 . . . (1986) (on a motion to dismiss courts 'are not bound to accept as true a legal conclusion couched as a factual allegation'). Factual allegations must be enough to raise a right to relief above the speculative level. . . ."

Twombly expressed disapproval of "bare" or "naked" assertions, *id.* at 1966, and quoted with approval 5 *Wright & Miller, Federal Practice and Procedure*

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[3] The Rule 12 petitioners were deposed prior to the district court's dismissal of their actions, but they did not request the court to convert the motion to dismiss into one for summary judgment. Moreover, their testimony confirmed that they were complaining about nothing but surveillance and that they all were able to buy any merchandise they wished from Dillard's. (8th Cir. Supp. Apdx 356-57, 380, 411, 438, 492, 506, 512, 537, 552-53).

§1202 at 94, 95 (3d ed. 2004) to the effect that "Rule 8(a) 'contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented'. . . ." *Id.* at 1965 n.3. The Court reaffirmed that "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Id.* at 1967, quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528 n.17 (1983). In the specific context of §1981, the Court has applied these principles to require that "[a]ny claim brought under §1981, therefore, must initially identify an impaired 'contractual relationship,' §1981(b), under which the plaintiff has rights." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 476 (2006).

Just last Term in *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009), the Court emphasized that the *Twombly* requirements apply to all federal complaints pursuant to Rule 8, which "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Citing *Twombly*, the Court reiterated the precepts that rightly disposed of the Rule 12 petitioners' claims below:

> "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action' will not do. . . . Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.*

In contrast to petitioners Gregory and Alberta and Carla Turner, who at least put some factual meat

on the bones of their complaint by reciting the details of a particular shopping experience, the nine Rule 12 petitioners merely uttered the very kind of formulaic legal conclusions deemed inadequate in *Twombly* and *Iqbal*. And, as emphasized by the Court of Appeals, they did not even properly invoke the provisions of §1981 because they did not identify an impaired contractual relationship or plead that there was the kind of interference with a protected activity that falls within the statute.

The disposition of the Rule 12 petitioners' claims was simply based on inadequate pleading and did not implicate any of the issues discussed in the Petition or encompassed by the Question Presented. This Court has twice in the last three Terms addressed the pleading requirements of Rule 8. The disposition below is in conformity with those rulings and presents nothing worthy of further review by this Court.

II. The Court of Appeals Correctly Affirmed the Summary Judgment Against the Remaining Four Petitioners, Who Complained That They Did Not Like Being Watched While Shopping; The Circuits Are Uniform in Holding That Discriminatory Surveillance Is Not Actionable Under §1981.

The record evidence concerning the claims of petitioners Crystal Gregory, Alberta Turner, Carla Turner, and Jeff McKinney is accurately set forth by

the Eighth Circuit majority at pages 20-23 of the Appendix to the Petition. The essence of Gregory's complaint was that two security officers were looking at her when she emerged from a fitting room and that the sales clerk had a "smirk" on her face. Because she was offended by this conduct, she made a voluntary decision not to buy anything.

The Turners were upset by a similar experience, where they were watched and followed by a security guard. Like Gregory, they expressed their displeasure by telling the sales clerk that they would not make a purchase and that "you just made someone lose a sale." As for petitioner McKinney, he merely sampled the cologne testers without ever indicating to anyone that he had any interest in buying anything. His claim was so barren that even the panel majority originally affirmed its dismissal (Pet. Apdx 106), though those two judges changed their mind when dissenting from the en banc opinion (*id.* at 55-56).

These distinctive facts, even when viewed most favorably to petitioners, establish unequivocally that this case involves nothing more than surveillance, despite petitioners' rhetoric about "racial harassment," "interference," "humiliation," and "obstruction." In contrast to some of the cases and monographs cited by petitioners, there is no evidence that *any* of these petitioners was stopped, detained, confronted, questioned, searched, accused of shoplifting, arrested, denied admittance, or asked to leave the store. In fact, no petitioner even asserted or testified that Dillard's security personnel *ever spoke a single word*

to him or her. This case involves nothing more than petitioners being watched.[4]

Admittedly some of the petitioners were offended by the surveillance and some decided to shop elsewhere as a result, but such a scenario doesn't come close to falling within the limited reach of §1981. The fallacy in petitioners' legal theory is that §1981 is an all-pervasive anti-discrimination statute that affords them a remedy for all perceived racial slights, including, in this case, hurt feelings. But the various Circuits have correctly recognized that this statute – aimed primarily at employment discrimination – does not provide a cause of action for a denial of the "expectation of being treated without discrimination while shopping." *Hampton v. Dillard's Dep't Stores, Inc.*, 247 F.3d 1091, 1118 (10th Cir. 2001), *cert. denied*, 534 U.S. 1131 (2002). *See also Kinnon v. Arcoub, Gopman & Assocs., Inc.*, 490 F.3d 886, 892 (11th Cir. 2007) ("Section 1981 does not provide a general cause of action for all racial harassment that occurs during the contracting process."); *Clegg v. Ark. Dep't of Correction*, 496 F.3d 922, 929 (8th Cir. 2007) (federal civil rights statutes do not "set forth a general civility code" or concern themselves with

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[4] Indeed, the Eighth Circuit granted en banc rehearing because the panel majority had grounded its reversal of the district court's dismissal on the basis of "weird grins," "staring," and "smirking expressions" by Dillard's security personnel (Pet. Apdx 84, 85, 86, 104).

"petty slights, minor annoyances, and simple lack of good manners").

This Court's latest §1981 decision has effectively rejected petitioners' cause. In *Domino's Pizza*, 546 U.S. at 476, 479, the Court noted that §1981 "has a specific function" limited to making and enforcing contracts and that it "offers relief when racial discrimination blocks the creation of a contractual relationship as well as when racial discrimination impairs an existing contractual relationship," but that it is not "meant to provide an omnibus remedy for *all* racial injustice." The Court in *Domino's Pizza* further observed that an expansive reading of §1981, such as that proposed here by petitioners, would not only defy the statutory language and congressional intent "but would produce satellite §1981 litigation of immense scope." *Id.* at 479.

This concern about runaway litigation is vividly illustrated here, where petitioners seek to recover actual and punitive damages for perceived or imagined slights and indignities even though not a single petitioner was denied the right to purchase any merchandise of his or her choosing. Section 1981 is a particularly attractive vehicle for such opportunism because there is no requirement for administrative exhaustion, and the damage caps imposed by §1981a(b)(3) on compensatory and punitive damages under most civil rights statutes do not apply to claims asserted under §1981. *See* §1981a(b)(4). Moreover, lawsuits under that statute typically abound with claims of emotional distress, lost appetites, sleepless

nights, etc. – which are essentially unverifiable and virtually irrefutable. Yet petitioners' interpretation of the statute would subject every retail establishment to the burden of extensive discovery and a jury trial on the complaint of any customer who alleges a supposed racial indignity and asserts that his subjective reaction caused him such angst that he did not want to do business with the offender's employer – even if he never intended to buy anything in the first place.

The conduct deemed actionable by petitioners pales by comparison to actions held by other courts *not* to give rise to a §1981 claim. In *Bagley v. Ameritech Corp.*, 220 F.3d 518, 519-20 (7th Cir. 2000), for example, the plaintiff had previously heard one of the defendant's employees say, "I hate f***ing Mexicans," and when he went to the defendant's store to buy a telephone, she gave him "the finger" and said, "I will not serve him." *Id.* at 520. The plaintiff was offended and left the store, then sued under §1981. The Seventh Circuit affirmed the dismissal of his case, holding that "[s]ince Ameritech was not responsible for terminating the transaction, it did not violate §§1981 and 1982." *Id.* at 522.

In *Arguello v. Conoco, Inc.*, 330 F.3d 355, 356 (5th Cir.), *cert. denied*, 540 U.S. 1035 (2003), the plaintiff Arguello had completed her purchase of gas and was in the process of buying beer when the employee serving her and her father "made several racially derisive remarks." The employee actually "began screaming racist remarks over the intercom." *Id.* at 357. The district court opinion noted that the "racial

obscenities" included calling Arguello "a f***ing Iranian Mexican bitch." *See* 2001 WL 1442340 (N.D. Tex. 2001) at *1. Her father, Alberto Govea, overheard the remarks and became so irritated with the treatment of his daughter that he "left the beer he had intended to purchase on the counter and walked out of the store." 330 F.3d at 357.

The Fifth Circuit concluded that neither Arguello nor Govea had a claim under §1981. The court held that the plaintiff "'must offer evidence of some tangible attempt to contract' that in some way was 'thwarted' by the defendant." *Id.* at 358, quoting *Morris v. Dillard Dep't Stores, Inc.*, 277 F.3d 743, 752 (5th Cir. 2001). The *Arguello* court observed that "[e]gregious as [the clerk's] conduct may have been, it neither prevented the formation of a contract nor altered the substantive terms on which the contract was made." 330 F.3d at 361. Govea's case was dismissed because "[a]lthough his decision to abandon his purchase resulted from [the clerk's] mistreatment of his daughter, [the clerk] did not actually interfere with an attempted purchase." *Id.* at 359.

More recently, in *Kinnon*, 490 F.3d at 889, the court upheld the dismissal of a §1981 claim by a black customer whose pizza delivery order was delayed so long that she left the delivery site and went to a restaurant to eat. When the delivery person returned to the pizzeria with the undelivered pizzas, the store manager called the plaintiff's office and left a threatening voice-mail message in which she called the plaintiff, among other things, a "piece of shit

nigger. Nigger bitch." *Id.* Relying on *Arguello*, the Eleventh Circuit ruled that the plaintiff had no §1981 claim because she had terminated the pizza contract unilaterally and the offensive conduct did not impair her ability to contract.[5]

The law around the country is thus uniform in its insistence that §1981 be limited to the purpose for which it was originally enacted in 1866 – to protect racial minorities from being shut out of a market by purposeful acts based on race. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 428 (1968) (noting that the 1866 Act was passed to counteract "laws virtually prohibiting Negroes from owning or renting property"). Dillard's is in the business of selling merchandise, and it is counter-intuitive to suggest that it would be unwilling to deal with a good-faith purchaser. Nothing in the record of this case suggests that it refused to sell any merchandise that any plaintiff wanted to buy, and plaintiffs' professions of embarrassment or umbrage do not get them past the courthouse door. The en banc Court of Appeals got it right, and there is no conflict among the Circuits on

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[5] In the cases cited by petitioners in which §1981 claims were deemed viable, the plaintiff was asked to leave the store (*Christian*, Pet. 14-15), was completely shunned and ignored when inquiring about the availability of facilities (*Keck*, Pet. 15), or was the victim of a state-sanctioned invasion of privacy (*Hall*, Pet. 15-16).

the issue actually presented by this case – discriminatory surveillance.[6]

III. Retailers Have a Right To Surveil Customers and Would-Be Customers, and To Monitor Their Movements, in Order To Prevent Shoplifting, Vandalism, Loitering, and Violence.

In rejecting petitioners' contention that §1981 affords a cause of action for any would-be shopper who feels offended by surveillance, the Court of Appeals took note of the prevalence of shoplifting in the retail sector (Pet. Apdx 26-27). Indeed, a department store has literally millions of dollars of merchandise on display adjacent to pedestrian aisles traversed by hundreds, even thousands, of persons each day. The doors are open to all – whether buyers, browsers, lookers, mall-walkers, or potential miscreants with nothing better to do. Being located in a shopping mall, as most Dillard's stores are, entails

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[6] Petitioners' assertion that there is an intra-circuit split within the Eighth Circuit (Pet. 18-20) is both wrong and irrelevant. To the extent that Judge Murphy's opinion in *Green v. Dillard's, Inc.*, 483 F.3d 533 (8th Cir. 2007), is inconsistent with the decision below, the en banc ruling obviously prevails and overrides any such inconsistent aspects of *Green*. Moreover, this Court does not ordinarily concern itself with disagreements among judges on the same court. *Davis v. United States*, 417 U.S. 333, 340 (1974). Dillard's sought review by this Court in *Green* because it was out-of-step with other §1981 cases, a situation now remedied by the en banc decision below.

additional concerns, as such malls have increasingly become magnets for teenagers and others looking for a place to "hang out."[7]

In a book entitled *Shoplifters vs. Retailers, The Rights of Both* (New Century Press, 2000), p. 94, the author points out that a "whopping $16 billion" in goods is shoplifted from retailers each year. Because police departments "couldn't possibly provide the necessary manpower required to deal with shoplifting . . . merchants must hire their own protective force and deal with the inherent risks always connected with detection and apprehension. . . ." *Id.* The author further notes that the costs associated with shoplifting, in addition to the value of the stolen merchandise, include "payroll for store security agents, television cameras, electronic detection equipment, astute surveillance systems, mirrors, radios, insurance premiums, and workmen's compensation injury claims." *Id.*[8]

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[7] A number of shopping malls have recently barred unaccompanied minors from their premises at night because of bad experiences involving hassling of customers, shoplifting, and even brawls. *See* "Galleria Mall Bars 160 Teens Under New Rule," ST. LOUIS POST-DISPATCH, Apr. 21, 2007, p. A-11.

[8] Security officials are also constantly plagued by safety concerns as, alarmingly, malls have recently been the scene of mass murders. In 2007, a deranged teenager killed nine people (including himself) and wounded at least five others in an Omaha department store. *See* "Omaha's Deadliest Hour: Worst Single-Day Killing Spree in Nebraska History," OMAHA WORLD HERALD, Dec. 6, 2007, p. 1. And early last year, five people were shot and killed in a Chicago-area mall. *See* "Five Women Slain in Store," CHICAGO TRIBUNE, Feb. 3, 2008, p. 1.

The "inherent risks" of protecting one's property should not include liability under §1981 if surveillance impacts one group more than another. In recognition of these legitimate security concerns, and in light of the limited reach of §1981, no appellate court has ruled that discriminatory surveillance violates §1981. *See Garrett v. Tandy Corp.*, 295 F.3d 94, 98-103 (1st Cir. 2002) (customer who was subjected to surveillance, watched carefully, branded a potential thief, and reported to police had no §1981 claim because he had completed the purchase of merchandise); *Morris v. Office Max, Inc.*, 89 F.3d 411, 412-14 (7th Cir. 1996) (where police were called because shoppers were "acting suspiciously," no §1981 claim even though encounter with police "caused them to 'los[e] interest'" in making a purchase because "[t]hey were denied neither admittance nor service, nor were they asked to leave the store"); *Morris v. Dillard*, 277 F.3d at 752-53 (customer who was detained for shoplifting but left store of her own accord without attempting to make any purchase did not state a claim under §1981); *Hampton v. Dillard's Dep't Stores, Inc.*, 247 F.3d at 1108, 1118 ("discriminatory surveillance" is "on its own not actionable under §1981," which does not "protect[ ] customers from harassment upon entering a retail establishment").[9]

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[9] Petitioners' selective description of *Hampton* (Pet. 14) neglects to note that liability was imposed there because the plaintiff was not permitted to redeem her coupon and obtain the

(Continued on following page)

The First Circuit in *Garrett* perhaps said it best:

> "In a society in which shoplifting and vandalism are rife, merchants have a legitimate interest in observing customers' movements. So long as watchfulness neither crosses the line into harassment nor impairs a shopper's ability to make and complete purchases, it is not actionable under section 1981." 295 F.3d at 101.

Therefore, even if we assume, *arguendo*, that Dillard's paid closer attention to African-American customers than to others, petitioners' case – based as it is on discriminatory surveillance – is not sustainable under §1981, and, as noted, there is no division among the Circuits on that issue.

* * *

Petitioners' characterization of this case as involving "racial harassment," and "interference" with the making of contracts is self-serving hyperbole not supported by the record. Nor is there any basis for claiming that the Eighth Circuit majority described Dillard's actions in those terms. Rather, the Court said that the evidence presented "shows at most discriminatory surveillance and watchfulness, which is not actionable interference under §1981" (Pet. Apdx 23). Petitioners' proposed expansion of §1981 to such garden-variety surveillance activities, based on the

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merchandise to which it pertained and therefore "suffered an actual loss of a privilege of her contract." 247 F.3d at 1106.

subjective sensibilities of those being watched, would blur the bright line drawn by the statute, would create an unmanageably slippery slope, and "would produce satellite §1981 litigation of immense scope" that the Court unanimously cautioned against in *Domino's Pizza*.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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